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November 16, 1998 NOV 16 1998

FEDERAL COMMUNICATIONS COMMISSION
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Magalie Roman Salas, Esquire
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Washington, DC 20554

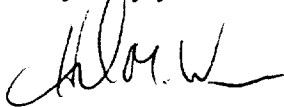
Re: MM Docket 98-176
RM-9363
Killeen and Cedar Park, Texas

Dear Ms. Salas:

Transmitted herewith, on behalf of LBJB Broadcasting Company, L.P., are an original and four copies of its "Comments" in the above-referenced proceeding.

Should any further information be required concerning this matter, please communicate with this office.

Very truly yours,



Howard M. Weiss
Counsel for LBJB Broadcasting Company, L.P.

HMW/jr
Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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NOV 16 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 73.202(b),) MM Docket No. 98-176
Table of Allotments,) RM-9363
FM Broadcast Stations.)
(Killeen and Cedar Park, Texas))

Directed to: Chief, Allocations Branch

COMMENTS

LBJS Broadcasting Company, L.P. ("LBJS"), licensee of KLNC(FM) (formerly KAJZ(FM)), Killeen, Texas, by its attorneys, hereby respectfully submits its Comments with regard to the *Notice of Proposed Rule Making*, DA 98-1939, released September 25, 1998 ("NPRM"), in the above-captioned proceeding. With respect thereto, the following is stated:

1. In the *NPRM*, the Commission proposes reallocation of Channel 227C from Killeen to Cedar Park, Texas, as that community's first local aural transmission service and modification of the license for KLNC(FM) to specify the new community. LBJS hereby reaffirms its interest in the proposed reallocation. Should the Commission make the proposed reallocation and modify KLNC's license accordingly, LBJS will timely file a modification application to implement the reallocation.

2. The proposed reallocation as set forth in the *NPRM* would provide a preferential arrangement of allotments. In determining whether a reallocation is preferential, the Commission "compares the existing arrangement of allotments with the proposed arrangement of allotment...." *Georgetown and Garden City, South Carolina*, 12 FCC Rcd 13394, 13395 (1997).

If Channel 227C is reallocated to Cedar Park as proposed, that community will gain its first local aural transmission service. This arrangement of allotments would trigger priority three set forth in *Revision of FM Assignment Policies and Procedures*, 90 F.C.C.2d 88, 92 (1982). On the other hand, pursuant to the existing arrangement of allotments, Killeen now has four local services. Even with the removal of KLNC(FM), Killeen would continue to be served by three stations licensed to the community: KRMV(AM), KNCT(FM), and KIIZ(FM). Moreover, because LBJS is not proposing to relocate its transmitter site or otherwise modify its facilities, KLNC(FM) would necessarily continue to provide a city-grade signal to Killeen. Clearly, the provision of a first local transmission service to Cedar Park would provide greater public interest benefits than the retention of a fourth local service at Killeen.¹

3. The city of Cedar Park is a thriving and growing community. It was incorporated as a Texas city in 1973. Cedar Park is located in southern Williamson County. Its population as of 1995 was approximately 14,000. This reflected a 180 percent increase from the 1990 U.S. Census population of 5,161.²

4. Cedar Park has an independent city government which consists of nine departments providing municipal services. These include police, fire, building inspection, public works, planning, library, finance/administration, parks and recreation, and a municipal court system. As

¹ The *NPRM* stated that no *Tuck* analysis was required under *Headland, Alabama and Chattahoochee, Florida*, 10 FCC Rcd 10352 (1995), since no site change is requested and KLNC currently serves the Austin Urbanized Area as well as the Killeen Urbanized Area. See n.2.

² All information contained herein regarding the community of Cedar Park has been obtained from the city's website on the Internet unless otherwise indicated. The address therefor is <http://www.ci.cedar-park.tx.us.html>.

set forth in LBJS's Petition for Rule Making, all of these departments provide substantial services to the community.

5. Cedar Park also is served by a number of local educational institutions, including one high school, two middle schools, one junior high, and seven elementary schools. In addition, Cedar Park is home to twenty-nine churches representing eleven denominations. A number of medical facilities also serve the community of Cedar Park, including one hospital and five medical clinics.

6. The city's businesses include nine banks, six insurance companies, and sixteen restaurants.³ These businesses are varied in nature, ranging from an automotive repair shop to a locksmith shop and a lawn and garden service, among others. In addition, Cedar Park has its own local weekly newspaper, the *Hill Country News*, and its own Chamber of Commerce.

7. From the information presented above, it is clear that Cedar Park is a vibrant and growing community in need of its own local radio service. Therefore, the reallocation proposed in the *NPRM* would result in a preferential arrangement of allocations.⁴

8. The proposed reallocation may be made in accordance with the Commission's rules and policies. Station KLNC(FM) is a pre-1964 "grandfathered" short-spaced station.⁵ LBJS is

³ The information contained within this paragraph was obtained from the Cedar Park Business Directory. See LBJS Petition for Rule Making at Attachment B.

⁴ The *NPRM* stated that, pursuant to Section 1.420(i), no competing expressions of interest will be accepted and LBJS will not be required to demonstrate the availability of an additional equivalent channel. At 3, ¶ 6.

⁵ The term "grandfathered" short-spaced station refers to those FM stations at locations authorized prior to November 16, 1964, that did not meet the separation distances required by the later-adopted Section 73.207 of the Commission's Rules, and have remained short-spaced since that time.

not proposing herein to relocate the station's transmitter site or to make any other technical modifications to its facilities. Accordingly, there can be no new short-spacings created, nor can any existing short-spacings be exacerbated as a result of the proposed reallocation. The Commission has previously established a policy that it will waive strict application of the minimum distance separation requirements set forth in Section 73.207 of its Rules in the context of requests for reallocation which involve no new short-spacings, no exacerbation of existing short-spacings, and no increased potential for interference between the currently short-spaced stations. *Newnan and Peachtree City, Georgia*, 7 FCC Rcd 6307 (1992) ("*Newnan/Peachtree City*").

9. In the *NPRM*, the Commission specifically requested comment concerning the continuation of its *Newnan/Peachtree City* policy. The reasoning behind the policy was that grandfathered short-spaced stations, which had been in compliance with the Commission's Rules when authorized, should in fairness be allowed the same opportunity to change community of license as other stations authorized in accordance with the Rules.

10. LBJS strongly supports continuation of the policy set forth in *Newnan/Peachtree City* and application of that policy to this proceeding. As set forth above, the proposed reallocation would allow LBJS to provide a first local aural transmission service to Cedar Park and, thus, would serve the public interest by providing a preferential arrangement of allotments. *Revision of FM Assignment Policies and Procedures*, 90 F.C.C.2d 88.

11. The benefit of providing a first local service would be achieved without any countervailing public interest detriment. The Commission has noted that the proposed amendment would create a "new" short-spaced allotment. *NPRM* at ¶¶4-5. In essence, however,

the reallocation would preserve the *status quo*. While the name of the community having a short-spaced allotment would change, the total number of short-spaced allotments would remain the same. Moreover, since no change in channel or technical facilities is proposed, there would be no increase in potential interference with any other station. Thus, the proposed reallocations would have no impact on the integrity of the FM band.

12. The Commission has in the past refused to make new allotments which were in contravention of the spacing requirements of Section 73.207 of its Rules. See, *e.g.*, *Front Royal, Virginia*, 9 F.C.C.2d 18 (1967); *Vass, North Carolina*, 45 R.R.2d 1741 (B/cast Bur. 1979); *Millington, Maryland*, 45 R.R.2d 1686 (B/cast Bur. 1979). In those instances, however, the proposed new short-spaced allotments involved either an increase in the total number of short-spaced allotments in the Table of Allotments or an exacerbation of an existing short-spacing. Therefore, there was a basis for concern about an increase in actual interference and potential degradation of service to the public. Such is not the case here, however. There will be no degradation of the FM band in that the total number of short-spaced allotments will remain the same. In these circumstances, no member of the public will suffer any loss of service, nor would any station experience any impact on its technical operations. Therefore, the basis for the Commission's prior rulings is inapplicable in this case.

13. Furthermore, the Commission has in the past made exceptions to the strict application of Section 73.207 in the allotment context. For example, in *East Los Angeles, Long Beach, and Frazier Park, California*, 10 FCC Rcd 2864 (M. Med. Bur. 1995), the Commission allowed a grandfathered short-spaced station to change community of license and transmitter location, despite the fact that the new location also would be short-spaced. The Commission

found in that instance that there would be no increase in interference potential, and there would be an increase in the number of persons served. In the instant case, similar reasoning would apply. Since no technical changes are proposed, there can be no increase in interference potential. The end result in both instances is the exchange of one short-spaced allotment for another, but, in both situations, public interest benefits -- either additional service or a first local service -- would be achieved.

14. In *St. Augustine, St. Augustine Beach, and Gainesville, Florida*, 7 FCC Rcd 7657 (M.Med. Bur. 1992), a station short-spaced to a third-adjacent channel station sought to change its channel so that it would operate on a second-adjacent channel. There, as here, no change in transmitter site location or technical facilities was proposed. In that case, the Commission noted that the spacing requirements are the same for second- and third-adjacent channels. Accordingly, the Commission found that there was no basis to distinguish between the proposed new allotment and the existing allotment, as the protection afforded the short-spaced station would be the same. Thus, the Commission considered the lack of effect upon the short-spaced station in concluding that a new, short-spaced channel should be allotted. *Id.*

15. The same rationale would apply to the instant proceeding. Just as there is no basis for distinguishing between a short-spaced second- or third-adjacent channel, there is even less rational basis for distinguishing between a short-spaced allotment at one community as opposed to another. Likewise, as in *St. Augustine, St. Augustine Beach, and Gainesville, Florida*, the proposed change in allotment will have absolutely no impact on the potential amount of interference received by the short-spaced station. Thus, it would be irrational and contrary to the public interest to find that a change in a short-spaced allotment from a third-adjacent to a second-

adjacent channel would be permissible, while a mere change in community of license would be impermissible.

16. The Commission also has taken into account considerations of fundamental fairness in making allotments which did not comply with the spacing requirements then in effect at the time at which they were made. In one case, the Commission made an allotment which did not comply with the requirements of Section 73.207 at the time that the order was issued, on the basis that the petition for rule making had been filed prior to the effective date of new requirements and had been in compliance with applicable spacing requirements at the time filed. *Oak Beach and Bay Shore, New York*, 59 R.R.2d 1652 (M. Med. Bur. 1986). Thus, the Commission has allowed flexibility in cases in which an allotment or proposed allotment originally was in compliance with the Commission's Rules, but because of subsequent changes, no longer met spacing requirements. Likewise, in the instant proceeding, the grandfathered short-spaced stations were in compliance with the Commission's Rules at the time that they were authorized. Fundamental fairness therefore requires that such stations not be forever barred from changing communities of license simply because of a later change in the Commission's Rules. The Commission has taken such equitable considerations into account in the past and ought to continue to do so.

17. Additionally, while it is possible that a licensee which has changed its community of license might at some point in the future also seek a technical change in its facilities, such considerations are irrelevant in this proceeding. The Commission has recently reiterated that speculation in an allotment proceeding as to future application plans is just that, speculation. *Warrenton and Enfield, North Carolina and LaCrosse and Powhatan, Virginia*, DA 98-1495,

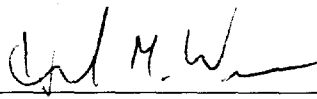
released July 31, 1998. Questions as to the acceptability of any future modification application are best addressed in the processing of that application, at which time it will be analyzed for conformity to applicable rules and Commission policies. *See East Los Angeles, Long Beach, and Frazier Park, California, supra.*

18. In sum, continuation of the policy articulated in *Newnan/Peachtree City* would serve the public interest. It will allow for preferential arrangements of allotments in that grandfathered short-spaced stations will have an opportunity to change communities to provide first local service to currently unserved communities, as Section 1.420(i) contemplates. The total number of short-spaced allotments will remain unchanged; the quality of FM broadcast reception will be unaffected. Thus, LBJs strongly urges the Commission to retain the policy set forth in *Newnan/Peachtree City* and to adopt the proposal made herein.

Respectfully submitted,

LBJs BROADCASTING COMPANY, L.P.

By:


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November 16, 1998